lie? In *Si Rusa Beach Resort Sdn. Bhd. v. Asia Pacific Hotels Management Pte Ltd.* [1985] 1 MLJ 132 FC, Abdul Hamid CJ Malaya (as His Lordship Tun LP then was) held in that case that "if the *status quo* is to be maintained, the only order that could properly be made is to allow the appellants to continue to run the hotel until the action is finally litigated and a decision made thereof".

(d) A valuable analysis of the manner in which an *exparte* order ought to be challenged was given by Sir John Donaldson MR, in *Wea Records Ltd. v. Visions Channel 4* [1983] 1 WLR 721. See *Ocean Software Ltd. v. Kay & Ors.* The Times Law Report of 29 January 1992

I can only conclude that the Kelab deserves some respite to continue its management. At this juncture the decision is merely to allow the Kelab to run its activities and use the land until a binding judgment can be made after the claims are tried. Both parties will again have their say, next time with evidence from witnesses and through documents. As the price of the land in Labuan jumps up dramatically by leaps and bounds so can we expect the parties to contest vigorously with all the armour and ammunition and ingenuity.

The Kelab has been occupying and using the land and premises for over a dozen years; the defendant has told Parliament that he is only a trustee and not owner of the land. If the "owner" holds NRIC No: 0000022, then who was it holding NRIC No: 0000008 who signed the transfer forms? If defendant is no longer the owner, who is? Several doubts remain uncleared and many questions of law remain unanswered. In the premises, I dismiss the defendant's application with costs.

TAMPARULI GRANITE QUARRY (SABAH) SDN. BHD. & ANOR.

v.

DAVID FUNG YIN KEE (PRACTISING UNDER THE NAME AND STYLE OF MESSRS. DAVID FUNG & CO. ADVOCATES & SOLICITORS)

HIGH COURT, KOTA KINABALU
DATO' SYED AHMAD IDID J.
[CIVIL SUIT NO. K. 285 OF 1989]
18 DECEMBER 1992

PRACTICE AND PROCEDURE: Claim against solicitor based on negligence - Plaintiff making application for summary judgment - Whether defendant has shown defence on the merits - Whether there are triable issues.

The plaintiffs' appointed the defendant to act for them in various civil suits. The suits were dismissed and the plaintiffs' claim that they instructed the defendant to undertake the appeals to the Supreme Court. The appeal documents were filed and/or served out of time and consequently the appeals were dismissed.

The plaintiffs' then sued the defendant for negligence and took out summary judgment proceedings under O. 14 Rules of the High Court 1980.

Held:

[1] There are questions involving serious legal examination that only a trial can determine and resolve.

[2] The defendant has raised triable issues. Considering all the claims defences and legal principles, this was not a proper case for the grant of summary judgment.

[Plaintiffs' application dismissed with costs]

Cases referred to:

Gill v. Lougher [1830] 1 Cr. & J. 170 ***(foll)***
Griffiths v. Evans [1953] 2 All ER 1364 ***(refd)***
Rondel v. Worsley [1966] 3 All ER 657 ***(refd)***
Miranda v. Khoo Yew Boon [1968] 1 MLJ 161 ***(refd)***
Kitchen v. Royal Air Forces Association [1958] 2 All ER 241 ***(refd)***
Bolam v. Friern Hospital Management Committee [1957] 2 All ER 112 ***(refd)***
Dummer v. Brown [1953] 1 QBD 710 ***(not foll)***
Avel Consultants Sdn. Bhd. & Anor. v. Mohamed Zain Yusof & Ors. [1985] 2 MLJ 209 / [1985] 2 CLJ 11 ***(dist)***
Bank Negara Malaysia v. Mohd Ismail bin Ali Johor & 2 Ors. [1992] 1 MLJ 400 / [1992] 1 CLJ 653 ***(dist)***

Malayan (Insurance) (M) Sdn. Bhd. v. Asia Hotel Sdn. Bhd. [1987] 1 CLJ 246 / [1987] 2 MLJ 183 ***(dist)***
Koh Siak Poo v. Perkayuan O.K.S. Sdn. Bhd. & Ors. [1989] 3 MLJ 164 / [1989] 1 CLJ 30 ***(dist)***
United Malayan Banking Corporation Berhad v. Palm & Vegetables Oils (M) Sdn. Bhd. & 7 Ors. [1983] 1 MLJ 206 FC / [1982] 2 CLJ 547 ***(foll)***
Lin Securities (Pte) v. Noone & Co. Sdn. Bhd. [1989] 1 MLJ 321 / [1989] 2 CLJ 844 ***(foll)***
Ibbitson v. Dunlop Tyre Service (Strathfield) Pty. Ltd. [1970] 44 ALJR 126 ***(refd)***
Allen v. Sir Alfred McAlpine & Sons Ltd. [1968] 2 QB 229 / [1968] 1 All ER 543 ***(refd)***
Birkett v. James [1978] AC 297 / [1977] 2 All ER 801 ***(refd)***
Hills v. Smith [1899] 108 LT Jo 134 ***(refd)***
Lloyd v. Grace, Smith & Co. [1912] AC 716 ***(refd)***
Re Manby and Hawksford [1856] 3 Sm & G 375 at 384 ***(refd)***
Sawyer v. Goodwin [1867] 36 LJ Ch 578 ***(refd)***
Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [1964] AC 465 / [1963] 2 All ER 575 ***(refd)***
Rankin v. Garton Sons & Co. Ltd. [1979] 2 All ER 1185 ***(refd)***

Legislation referred to:
Partnership Act 1890, s. 10 (UK)
Rules of the High Court 1980, O. 14, O. 45 r. 11
Subordinate Courts Rules 1980, O. 29 r. 5

Other sources referred to:
Cordery's Law Relating To Solicitors (7th Edn.) by Graham J Graham-Green p. 152
Clerk & Lindsell on Torts 16th Edn. 11-32

For the plaintiffs - Sugumar Balakrishnan; M/s. Sugumar & Co.
For the defendant - Henri P.S. Cheu; M/s. Tsai Cheu & Adnan

JUDGMENT

Syed Ahmad Idid J:

When notices of appeal are not filed in time, and the appeals are then dismissed (by the Supreme Court), can any party hold any lawyer responsible and make him liable to pay damages? Is a lawyer liable if he was not retained by the party who intended to appeal? Can a lawyer be "retained" when the prospective clients neglect or refuse to pay his professional fees in time?

To appreciate the difficulties of this matter, it is useful to remind ourselves that the 1st plaintiffs had defaulted in their instalment payment and Hong Leong Finance Berhad ("Lessor") terminated the Lease Agreement dated 30 January 1985 and claimed for loss and damage of heavy equipment for use in stone quarry business. The Lessor on 16 February 1987 obtained final judgment against the 1st plaintiffs (and the 2nd plaintiff and another as guarantors) for the sum of RM1,211,523.66 with interest and costs [Suit No. K. 11 of 1987 ("Judgment")]. The Lessor then sold the equipment by public auction through a licensed auctioneer realising the sum of RM215,839. The defendant, acting upon the instructions of the 1st and 2nd plaintiffs applied through a summons-in-chambers dated 20 January 1988 for a stay of execution of the judgment under O. 45 r. 11 of the Rules of the High Court 1980.

The defendant had in originating summons No. 93 of 1988 on 11 July 1988, applied on behalf of the 1st plaintiffs for:

(a) A determination and a declaration that the property in the equipment passed from the Lessor to the 1st plaintiffs upon the termination of the Lease Agreement.
(b) A determination and declaration that the Lessor having elected to enter judgment for the sum of RM1,211,523.66 on 16 February 1987 was estopped from having delivery up of the said equipment and selling the equipment thereafter; and
(c) A declaration that the sale by public auction of the equipment on 30 April 1987 at the instructions of the Lessor was unlawful.

The application in Suit K. 11 of 1987 and the originating summons No. 93 of 1989 were both dismissed by the High Court on 25 May 1989.

(i) The plaintiffs embroiled in such a scenario now claim that they instructed the defendant to undertake the two civil appeals which were (to quote their counsel) "aptly dismissed with costs by the Supreme Court on the grounds the appeal documents were filed and/or served out of time." For this, the 1st and 2nd plaintiffs apply for final judgment of RM2,180,000 and RM3,159,000 respectively against the defendant, damages to be assessed, interest from 22 November 1989, and statutory interest, costs and other just or better relief.
(ii) The plaintiffs claim that the dismissal of their two appeals (or 1st and 2nd appeals) were wholly caused by the negligence and/or breach of duty of the defendant who failed to comply with the time prescribed by the Rules of the Supreme Court 1980.

The 1st appeal was in respect of No: 02-245-1989 in the matter of Kota Kinabalu High Court Suit No: K. 11 of 1987 and Application for Execution Nos: 116 of 1987 and 226 of 1987 between Hong Leong Finance Berhad and both plaintiffs. The 2nd appeal was in respect of No. 02-246-1989 in the matter of Kota Kinabalu High Court originating summons No. 93 of 1988 between the 1st plaintiffs and Hong Leong Finance Berhad.

The sum of RM2,180,000 represents what the 1st plaintiffs claim they could have recovered in respect of equipment sold by Hong Leong Finance Berhad in 1987. The 2nd plaintiff claims the sum of RM3,159,000 as the market value of all the properties put up for public auction. Additionally, the 2nd plaintiff says he and his family suffered considerable mental anguish and pain and he was put to considerable trouble inconvenience, anxiety and expense. In addition, both plaintiffs claim to be indemnified in the sum of RM71,000 being legal fees paid to the senior Counsel and their present Solicitors.

The defendant now resides in Sydney, Australia, as he is on sabbatical leave and is reading for the Masters of Law degree.

Facts and disputes

On the strength of the affidavits, there are conflicts in the evidence. Let me cite a few:

(i) Despite numerous requests from the defendant the plaintiffs failed or refused to settle the outstanding bills of Messrs. Tan Pang Tsen Fung & Co., and did neither (a) deposit the sum of RM10,000 with the defendant, nor (b) engage a senior Counsel for the two appeals before 24 June 1989. The defendant contends that he has exercised all due skill and care and there can be no negligence on the doctrine of professional immunity for contentious work carried out by an advocate.

(ii) Why did the defendant attend as Counsel at the 1st and 2nd appeals on 22 November 1989 when he was not instructed or authorised (as he now says) to do so? If the plaintiffs had retained Cyrus Das, Esq., from Messrs. Shook Lin & Bok of Kuala Lumpur, why was the leading Counsel not available at the hearing before the Supreme Court on 22 November 1989? The defendant says that plaintiffs had agreed that he was only to assist the senior Counsel.

(iii) Can the defendant's honest belief that the solicitors for the respondents in the appeals would not raise any objection after his telephone conversation with Mr Cecil Robertson of Messrs Skinner Lind Robertson Willie Wong & Chin, on 26 June 1989 be of any asistance? Mr Cecil Robertson was not available at the appeals because he was in Australia recovering from heart surgery. Did the Supreme Court insist that the defendant deal with the preliminary objections from Mr Cecil Abraham, the respondents' leading Counsel? Mr. Sugumar pointed out that it was unlikely for Mr. Das to have instructed the defendant to file the documents out of time.

(iv) Plaintiffs claim that the defendant admitted before the Supreme Court of Malaysia that the delay was solely caused by his mistake. The defendant denies this. Mr. Henri Cheu, learned Counsel, however, argues that defendant had not been "retained" by the plaintiffs and the notices of appeals could not have been filed on time. It was questioned whether the plaintiffs can show that they would have been in a better position had the defendant not embarked upon the rescue attempt.

(v) If the solicitor (or Counsel) decides that no good cause of action exists, it is the solicitor's duty to inform his client and advise him not to proceed. *Gill v. Lougher* [1830] 1 Cr. & J. 170 and the defendant said he did this. Can he be liable for negligence if the client insists on instituting proceedings (or on appealing as in this case)?? Cordery's Law Relating To Solicitors (7th Edition) by Graham J Graham-Green at p. 152. See *Griffiths v. Evans* [1953] 2 All ER 1364.

Legal Contentions:

Plaintiffs seek the support of Cordery's Law (supra) at p. 150 under the heading "Obligations arising out of Retainer" which states:

> At common law a solicitor contracts to be skilful and careful ... This undertaking is not fulfilled by a solicitor who either does not possess the requisite skill or does not exercise it. It is immaterial whether the solicitor is

> retained for reward or volunteers his services,... Additionally in general, he is liable for the consequences of ignorance or non-observance of the rules of practice of this court, for the want of care in the preparation of the cause of trial ... *Fletcher & Son v. Jubb Booth & Helliwell* [1920] 1 KB 275.

See *Rondel v. Worsley* [1966] 3 All ER 657, read with *Miranda v. Khoo Yew Boon* [1968] 1 MLJ 161. See also *Kitchen v. Royal Air Forces Association* [1958] 2 All ER 241.

Mr. Henri Cheu disagrees with the proposition tendered by the plaintiffs and accordingly rebuts it by citing the *Bolam* test, [*Bolam v. Friern Hospital Management Committee* [1957] 2 All ER 112 McNair J], where the duty is like that of every other professional person, that is, to exercise that reasonable degree of skill and care to be expected of a competent and reasonably experienced solicitor (and no more). In determining when an error made by a solicitor is negligence, he should not be judged by the standard of what a particularly meticulous and conscientious practitioner would elect to do but by what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession. See Clerk & Lindsell on Torts, 16th Edition, 11-32. For this purpose we can take into account the case of *Miranda v. Khoo Yew Boon* (supra) where Azmi CJ (Malaya) said, (in respect of the fused profession of barrister and solicitor in this country): "Therefore if he is negligent, he can be sued." There is agreement that in an appropriate case, where an advocate (in Sabah or elsewhere) is negligent, he can be sued and damages be recoverable from him/her.

Order 14:

The plaintiffs took an extraordinary course in prosecuting their present claims under O. 14 presumably on the advice of their Counsel. Although the instant case involves professional negligence, Counsel urges upon the Court that there is no valid or compelling reason why O. 14 should not be applied in view of the principles enunciated in several cases, particularly on the strength of *Dummer v. Brown* [1953] 1 QBD 710. Counsel is of the opinion that if a trial is ordered then not only will it work injustice against the plaintiffs but will invariably involve the plaintiffs in a costly and time consuming trial. Even in *Dummer v. Brown* (supra) Jenkins LJ said he "felt some difficulty over this case" where the claim in negligence arose out of an accident causing death. The 2nd defendant there had been convicted on his plea of guilty and accordingly the summary judgment was applicable. It is not so here to-day. Singleton LJ (at page 716) says: "I would not apply these provisions (O. 14) to a case involving any sort of complication or difficulty." I agree that the law must be able to keep up with the times but as the ultimate objective of dispensing justice must be accorded top priority, one must ensure that in a deserving case a trial be arranged for parties to review their arguments and contentions.

I shall consider the principles of O. 14, this being plaintiffs' application for summary judgment. If the facts and the law accord with those in the following decisions, I shall grant the orders which plaintiffs seek:

(a) In *Avel Consultants Sdn. Bhd. & Anor. v. Mohamed Zain Yusof & Ors.* [1985] 2 MLJ 209, the Supreme Court held that where the learned Judge found that the respondents committed breach of their fiduciary duties, there can be no more defence and the appellants should therefor be entitled to judgment and the rest of the case should only be a matter of the requisite relief.

(b) Similarly in *Bank Negara Malaysia v. Mohd Ismail bin Ali Johor & 2 Ors.* [1992] 1 MLJ 400/[1992] 1 CLJ 653 the Supreme Court held that the respondent had unequivocally admitted liability under the scholarship agreement and judgment ought to be entered against him; and

(c) *Malayan (Insurance) (M) Sdn. Bhd. v. Asia Hotel Sdn. Bhd.* [1987] 1 CLJ 246/ [1987] 2 MLJ 183. The principles of this case were reiterated in another Supreme Court case of *Koh Siak Poo v. Perkayuan O.K.S. Sdn. Bhd. & Ors.* [1989] 3 MLJ 164. In brief, if the Court is of the opinion that there are no issues which are triable, then judgment can be entered against the defendant.

It is useful to remind ourselves of cases already decided by our Courts which went in the opposite direction, e.g.:

(a) that it is not within the province of the Court to touch on the merits of the issues involved - the Court only need to consider whether or not there are issues or questions in dispute which ought to be tried - summary judgment is only given in a plain

and obvious case. *United Malayan Banking Corporation Berhad v. Palm & Vegetables Oils (M) Sdn. Bhd. & 7 Ors. [1983] 1 MLJ 206 FC*; and

(b) where there are far too many questions to be dealt with, some of which are difficult questions of law, the defendant ought to be given unconditional leave to defend. *Lin Securities (Pte) v. Noone & Co. Sdn. Bhd.* [1989] 1 MLJ 321.

Legal Contentions:

Let me discuss a few aspects which may impinge on the issues which both parties have raised. In *Ibbitson v. Dunlop Tyre Service (Strathfield) Pty. Ltd.* [1970] 44 ALJR 126, a litigant had a right of appeal from a final judgment but lost it when his solicitor could not file the notice of appeal as he arrived at the Registry after it had closed. An application for special leave to appeal out of time was refused on the ground that no question of general importance had been raised by the appeal. Presumably, if the client would otherwise have succeeded in the appeal, the solicitor would have subsequently been held liable for negligence in failing to have regard to the Rules of Court appointing the hours during which the Registry is open. The question whether or not the plaintiffs in to-day's action could have succeeded in the appeals has a bearing. This is obviously a matter which only a trial can enable the plaintiffs to prove.

I agree with the claim that this instant case is "classic". Learned Counsel know that I will order summary judgment in deserving cases. But what do we have here? The plaintiffs' allegations are challenged by the defendant at every turn. I am aware that a solicitor is negligent if his conduct results in his client's action being dismissed for want of prosecution. The Court will ensure that the client is informed of the dismissal and of the reasons for it. *Allen v. Sir Alfred McAlpine & Sons Ltd.* [1968] 2 QB 229; [1968] 1 All ER 543; *Birkett v. James* [1978] AC 297; [1977] 2 All ER 801. Did the Supreme Court say so? Does the Supreme Court records show this? Any statement such as "In dismissing the 1st and 2nd appeals, the Supreme Court of Malaysia held that the defendant was solely to be blamed for the failure to file and/or serve the relevant appeal documents within the time prescribed in the Rules of the Supreme Court 1980" **naturally calls for proof commensurate with its seriousness**. There is, however, no such proof at this stage.

The defendant, on the other hand , claims that the 2nd plaintiff did not settle his previous outstanding bills and further that:

> Mr. Lee Tain Tshung himself returned to my office in the afternoon of the 25 May 1989, and again asked me to reconsider my decision not to undertake the necessary appeals on the plaintiffs' behalf. I asked him to engage another firm of solicitors.

Further on, the defendant says:

> Mr. Lee Tain Tshung informed me on or about 28 August 1989 that the plaintiffs would be engaging Mr. Cyrus Das of Messrs. Shook Lin & Bok in Kuala Lumpur. I met Mr. Cyrus Das in Kuala Lumpur on the 30 August 1989 to brief him on behalf of the plaintiffs. I was then instructed by Mr. Lee Tain Tshung to write to the Lord President to request for an early date of hearing of the appeals, whether it be in Kota Kinabalu or Kuala Lumpur, and this I did by a letter dated 14 September 1989.

Mr. Sugumar quite rightly pointed out that the defendant had a choice, to act for plaintiffs or not to act.

While I am in full agreement that a solicitor is liable as principal for the negligence of his clerk [*Hills v. Smith* [1899] 108 LT Jo 134], even to the extent of being liable for the fraud of a managing clerk who was acting entirely for his own benefit [*Lloyd v. Grace, Smith & Co.* [1912] AC 716], or partner [*Re Manby and Hawksford* [1856] 3 Sm & G 375 at 384; *Sawyer v. Goodwin* [1867] 36 LJ Ch 578; and see Partnership Act 1890, s. 10], if acting within their authority, I have to ascertain if in this case the defendant was negligent albeit through the negligence of his office staff. This, so far, is not clearly borne out.

This Court will not tolerate poor standards of service be they by legal practitioners or other professionals. Those who do not perform to the best of their ability or who fail to serve as expected of people in their class [See *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] AC 465/[1963] 2 All ER 575] will have to pay for their incapacity or deficiencies or negligence, the last being defined as the "omission to do something which a reasonable man would do..." **But negligence on its own cannot ground any action**. There must be proof of actual damage, and that such damage was

directly caused by such negligence. It must also be shown that the defendant was under a duty, to the person to whom damage was caused, to avoid doing that damage. *Rankin v. Garton Sons & Co. Ltd.* [1979] 2 All ER 1185.

Would the plaintiffs have succeeded at the appeals? Mr. Sugumar concedes that we would never know. On the totality of the evidence, it is manifest that doubts exist ... was the defendant "retained"? The Sessions Court in Kota Kinabalu under O. 29, r. 5, of the Subordinate Courts Rules ordered the defendant there (or 1st plaintiffs here) to pay RM42,616.30 to the plaintiff there (or defendant here) being professional fees. If indeed the 2nd plaintiff had instructed senior Counsel, why was the senior Counsel not present or why did he not act in the appeals? Could defendant have relied upon the oral conversation with Mr. Cecil Robertson? Had he acted reasonably in not applying for the requisite extension of time to serve the notices of appeal? Was the defendant negligent, and did he act in breach of a duty of care to the plaintiffs? Were the plaintiffs' losses directly attributable to defendant's breach of duty? What exactly are the measures of damages and can plaintiffs prove each head of the measures? These are questions involving serious legal examination. Mr. Henri Cheu rightly points out that only a trial can determine and resolve these questions.

In my opinion, the defendant has touched on several doubts. The facts in *Avel Consultants, Bank Negara, Malayan Insurance* and *Koh Siak Poo* (discussed earlier) are different. Here the defendant is able to raise triable issues. The determination of whether an issue is or is not triable depends on the facts (which I have discussed earlier) and the law arising from each case. *Bank Negara Malaysia* (supra). I am inclined towards the decisions in *United Malayan Banking Berhad v. Palm & Vegetable Oils (M) Sdn. Bhd.* (*supra*) and *Lin Securities (Pte) v. Noone & Co. Sdn. Bhd.* (*supra*). With respect, I must decline to follow *Dummer v. Brown* (supra). The other cases can be distinguished on the peculiar facts of each. Considering all the claims, defences and legal principles, this cannot be a proper case for the Court to grant summary judgment under O. 14. I accordingly dismiss plaintiffs' summons in-chambers dated 24 March 1990 with costs.